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IN THE

Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

vs.

No. 316

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

WILFRED C. VARN, ESQ.
of the law firm of
Ervin, Pennington, Varn & Jacobs
Post Office Box 1567
Tallahassee, Florida

Attorneys for Appellant

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REUBEN CAPELOUTO,

Appellant,

vs.

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

(On Appeal from the Supreme Court of Florida)

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

This appeal is taken pursuant to 28 U.S.C. 1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitutions, treaties or laws of the United States, and the decision is in favor of its validity."

The appellee does not deny obligatory jurisdiction in this Court of this appeal under that statute; but it argues that the questions involved in this appeal lack substantiality.

The import of this case lies in its restriction upon the right of an individual to follow a lawful calling and thereby to earn a living for himself and his family.

Every person has the right to engage in any lawful occupation, trade, or calling, and such right is "property" and "liberty" of which one may not be deprived without due process of law. The right to engage in a useful and legitimate business may be regulated but not prohibited. See 16A C.J.S. 1069.

This Court, in **Coppage v. Kansas,** 236 U.S. 1, at page 14, stated:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of per-

> sonal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

And in 16 C.J.S., at page 1081, is stated:

> "Everyone has the right to work and earn a living, and the pursuit of any legitimate trade, occupation, business, or profession is recognized under our form of government. Such a right is fundamental, natural, essential, and inalienable right, one of the privileges of citizenship and is fully protected by fundamental laws."

Appellee—an employer, an affiliate of a nationwide pest-control concern, with thousands of employees—seeks by the use of a mandatory contract with its employees, to eliminate competition in killing bugs. The danger in such contracts lies in the control given to an employer over his employees, not only during employment but also for long periods of time subsequent to the termination of the employment. And here, as always, the employer seeks to justify the restraint by saying, "He didn't have to sign the contract." This is a completely unrealistic attitude; is there any individual who would refuse to sign such a contract during his term of employment, especially if it be a condition for continued employment? Does an

employee normally have any idea of competing with his employer in the future? Certainly not. The insidious nature of this contract and of any law allowing it is readily apparent.

Such a contract was void at common law as being against public policy. It was against public policy because it forbade one from engaging in a lawful occupation, and would result in destitution. Thus, the common law simply stated the fundamental law, the natural right to earn a living. This right is protected in the United States by our Constitution; and when the state permits that right to be fettered in any way, its action is invalid.

The employer-employee contract not to compete is one of three types of contracts in restraint of trade which only since 1953 have been permitted under the Florida statute. It is the validity of that statute relating to the employer-employee contract which is attacked and which was attacked below. The "validity" of a state statute is sustained, for purpose of an appeal under 28 U.S.C. 1257(2), when the state court holds the statute to be consistent with the Federal Constitution; **La Crosse Tel. Corp. v. Wisconsin Employment Relations Board,** 336 U.S. 18. This the Florida court did.

For the sake of this argument, however, let us assume that the subject contract does not impinge upon

the right of appellant to earn a living. The contract specified that within the stated territory the appellant could not compete, directly or indirectly, with his employer for two years after the termination of employment. The contract was terminated effective May 1, 1964. Under no circumstance was the covenant not to compete operative after May 1, 1966. The lower court, however, arbitrarily extended the term of the contract for an additional period of more than nine months, until February 1, 1967. It is interesting to note the dissent below on this point, in which three justices of the Supreme Court of Florida (out of seven) agreed that this was error, saying (Jurisdictional Statement, App. 8):

> "Capelouto terminated his employment on May 1, 1964, and it is my view the injunction should have been made effective for a period ending two years thereafter."

To extend the duration of the contract without the agreement of both parties to the contract is completely beyond the power of the court; its action, as an arm of the State of Florida, was therefore arbitrary and unreasonable as applied to this appellant and violates the Fourteenth Amendment. As stated in 43 C.J.S. 575, in discussing covenants not to compete in contracts of employment:

> "Where protection is restricted by the agreement to a designated time, the agreement binds the parties as to the time stipulated and after the expiration of the period the prohibition ceases to exist, and injunctive relief will not be afforded for a time beyond that for which the parties contracted."

The appellant filed his suit below promptly; but the lower court failed to rule until five months after the final hearing had elapsed. The appellant must not be charged with delay engendered by the court.

Appellee claims that the **Miles** decision (**Dr. Miles Medicine Company** v. **John D. Park & Sons Co.**, 220 U. S. 373) has settled the issues raised here. That case, however, involved the validity of an agreement between a manufacturer, wholesaler and retailers creating a combination to maintain prices and stifle competition. This Court condemned the contract there found to be in restraint of trade.

We do not disagree with the general principles of law there set forth; but those principles cannot be used to justify the type of contract with which we are here involved; neither can they justify the action of the state court in extending the life of the contract not to compete, thereby adding further restraint to appellant's right to earn a living.

Although appellee claims "hundreds" of state and federal decisions in accord, none are cited; and the annotations in 41 and 43 A.L.R. 2d do not go to the validity under the United States Constitution of state statutes authorizing contracts between employer and employee by which the latter may not compete with the former.

The appellee, at page 3 of its motion, makes the statement:

> "The Supreme Court of Florida held the statute to be valid and the contract to be reasonable and enforceable. Appellant, Capelouto, urges that a federal question is involved and contends that the statute offends the Fourteenth Amendment to the Federal Constitution."

While it states that the "Supreme Court of Florida has upheld the statute and contracts entered into pursuant thereto in several decisions", the only decision cited is **Standard Newspapers** v. **Woods**, 110 So. 2d 397; but, as the lower court in this case held (see Jurisdictional Statement, App.20):

> "Moving then to a consideration of the constitutionality of subsection (2) in the light of the construction of its terms as authorizing a non-competitive contract to extend beyond termination of employment relationships, it is found that our appellate courts have not directly and expressly passed on this question."

The Supreme Court of Florida itself recognized this, by stating (Jurisdictional Statement, App. 4):

> "Therefore, as the chancellor recognized in the decree under review, the **Standard Newspapers** case did not specifically settle the constitutionality of subsection (2), Section 542.12, as applied to contracts affecting employees or agents."

The decisions of the Florida District Courts of Appeal cited by appellee were erroneously premised upon the **Standard Newspaper** case, which had only held the basic statute to be constitutional. The appellee, therefore, is incorrect in its statement in this regard.

While appellant is "overwhelmed by available authorities", we are not so. The cases cited do not go to the question of constitutionality, but only to reasonableness of time and area. After all, even under the Florida statute, the time and area must be reasonable.

A careful review of the cases cited show that two years has been generally found by the Florida courts to be reasonable; and those circumstances in which two years would be unreasonable are nonexistent. As to area, any area coextensive with the area in which the employee worked is deemed reasonable by the Florida courts.

What appellee is really trying to say is: An employee has freedom to contract and freedom to earn

a living, but by the exercise of the first he may limit the second. We do not believe this to be the law of these times. To agree with appellee is to open the door to monopoly and restraint of trade of the rankest sort. Public policy, as expressed by Federal anti-trust laws, generally opposes such restraint. To allow such contracts is to allow employers to say to their employees—secretaries, service personnel, maintenance men, with no exception: "You may work for me if you sign a contract not to compete." Which means, "If you work for me in Florida, you cannot work for my competitor in Florida for as long as two years after you leave my employ, whether you quit or I discharge you!"

The substantial nature of the questions raised by this appeal is beyond cavil.

Appellant requests that the matter be considered on its merits by this Court.

Respectfully submitted,

WILFRED C. VARN
of the law firm of
Ervin, Pennington, Varn & Jacobs
Post Office Box 1567
Tallahassee, Florida

Attorneys for Appellant

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable J. Lewis Hall, of Hall, Hartwell, Hall & Canada, counsel of record for appellee, at the office of said counsel, Midyette-Moor Building, Tallahassee, Florida, this ..... day of ....., 1966.

.....

Attorney for Appellant
and a member of the bar of the
Supreme Court of the United States

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